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In the Supreme Court of the United States.

October Term, 1908.

No. 546.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
against
JAMES L. CARSON, Defendant in Error.

In error to the Supreme Court of the State of South Carolina.

(19,197.)

Brief in behalf of the plaintiff in error upon motion of defendant in error to dismiss writ of error and to affirm judgment.

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Preliminary Statement.

The defendant in error, James L. Carson, was a brakeman employed by Southern Railway Company. On August 16th, 1902, while attempting to make a coupling of two freight cars at Converse, S. C., upon the line of the said Railway, his right arm was crushed, necessitating amputation.

On September 24th, 1902, he instituted an action in the Court of Comon Pleas for Greenville County, S. C., against the said Railway Company and J. C. Arwood, Conductor, and J. D. Miller, Engineer, alleging that his injury was caused by the joint and concurrence negligence and wilfulness of the said three defendants in the particulars specified, to wit, (1) in having a defective coupler. (2) In backing the cars for the purpose of making a coupling without notice or warning to the plaintiff.

The circumstances of the accident, detailed by the plaintiff were substantially as follows: He was engaged at the time as brakeman upon a freight train running between Spencer, N. C.,

and Greenville, S. C. ; at Converse, an intermediate station, certain freight cars in his train were to be cut out and left upon a side track ; upon this side track thre were at the time two other freight cars to which it was desired to couple the cars to be left there ; Carson was directed by the conductor to make the couplings to these cars ; his train was backed into the side track and the coupling with the forward car of the moving train and the first of the stationary cars on the side track was made safely ; the stationary cars on the side track were some five or six feet apart ; after making the first coupling Carson went forward to make the second ; when he caught hold of the lever to adjust the knuckles for this second coupling he discovered that the pin which prevented the coupling pin from coming all the way out of the knuckle was lost and that he could not make the coupling without going in between the cars and adjusting the knuckle by hand ; while so engaged the cars came together and mashed his arm ; he stated that he warned the conductor to hold the cars steady till he was ready for them to come back.

The testimony, for the defendants did not materially differ from the foregoing, except upon the point that the conductor and engineer knew that Carson was going to adjust the knuckle by hand and that they were warned to hold the cars steady. They showed that they had no knowledge of the defective coupler or of Carson's purpose to go in between the cars. Disinterested witnesses testified that Carson give no notice to anybody, but that as soon as he discovered the pin missing, while the cars were coming back upon him, he rushed in hoping to adjust the coupling in time, but failed. One witness who was not more than six feet from him was so impressed with the impending disaster that he yelled to Carson not to go in.

The case was tried at Greenville before Judge Watts and a jury, November, 1902. The jury returned a verdict in favor of the plaintiff against the Southern Railway Company for $6,500, No mention was made in the verdict of the other two defendants, the conductor and the engineer : which in law is equivalent to a finding in their favor.

The defendant Southern Railway Company then appealed to the Supreme Court of South Carolina, which on the 18th August, 1903. affirmed the judgment below.

Whereupon the said Southern Railway Company prayed for and was allowed a writ of error in this Court.

Points and Authorities.

We respectfully submit that this writ of error involves the following Federal question :

I.

The right of removal depending absolutely upon the allegations of the plaintiff's complaint, where he alleges a joint and concurent tort, the foreign defendant is thereby concluded. He should not therefore be allowed to recover upon a state of facts which, if alleged, would present a separable controversy, a removable cause.

To effectually defeat the right of the foreign defendant to remove a case to the Federal Court, at the inception of a suit, all that the plaintiff has to do is to join one of the servants as a codefendant and allege that the injury was caused by the joint and concurrent negligence of the master and servant.

"A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to a final decision in his own way. The cause of action is the subject matter of the controversy, *and that is*, for all the purposes of the suit, *whatever the plaintiff declares it to be in his pleadings.*"

Powers vs. R. Co. 169 U. S. 92.
Dixon vs. R. Co. 179 U. S. 131.

The plaintiff, in the case at bar, having alleged that his injuries were caused by the joint and concurrent negligence and wilfulness of the three defendants, the Southern Railway Company was concluded by that allegation and made no effort to remove the cause.

The verdict plainly exemplifies the injustice against which we inveigh. The jury having found in favor of the conductor and engineer, that is a judicial declaration that the negilence charged to them was not established. The negligence charged to the Railway Company, upon which alone can the verdict now be ascribed, was the matter of the defective coupler, with

which the employee defendants had nothing to do. If the complaint had counted upon that act of negligence alone, the Railway Company could have excercised its right to remove the case. Now it has been deprived of that right by allegation of joint and concurrent negligence judiciously declared not to have invested, and recovery had upon a distinct ground which if alleged would have furnished ground for removal.

It is no sufficient answer to our position to say that this does not present a Federal question for the reason that the right of removal was not invoked by the Railway Company. The right of removal was not invoked because it had been destroyed by the plaintiff's allegation of joint and concurrent tort. Since this allegation is so destructive of the defendant's privilege and of such consequence to the conceived interests of the plaintiff, it does seem that he should be compelled to prove what he has alleged, and not be allowed to recover upon a state of facts entirely different, and which if alleged in the first instance would have permitted a removal.

If this be the law, the plaintiff may always insert as a co-defendant a man of straw, with an allegation of joint and concurrent negligence, and after the real defendant has thus been compelled to remain in the State Court and answer, make no proof against the nominal defendant whatever, and recover his judgment against the real defendant.

It may be true that in such a case the defendant corporation might petition for removal upon the grounds of fraud, but when the agents are joined under an allegation of joint and concurrent negligence, the truth of such allegation can only be ascertained by a joint trial.

II.

To allow plaintiff after alleging a joint and concurrent tort by a railway corporation and its servant or servants, to recover damages without proof of such joint and concurrent tort, but simply upon proof of a negligent act on the part of such a servant, or servants, would deprive the Railway Company of its property without due process of law, contrary to Amendment XIV Constitution of United States, for this reason: It would deprive said company of the right of reimbursement from the defaulting servant or servants, which would exist were the tort not joint

and concurrent, but simply the wrong of the servant or servants for which the company would be liable.

This is the fourth assignment of error, see Transcript, F. 132.

The doctrine is well settled that there is no contribution or re-inbursement as between joint tort-feasors. "When two parties acting together commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable, or *participes criminis*, and the damage results from their joint offense." *Gray vs. Boston Co;* 114 Mass. 149.

If therefore in such an action a verdict should be rendered against the master it must be referred to the cause of action declared upon, the joint and concurrent negligence; and when the master pays off the judgment he could not enforce re-imbursement from the servant, for the reason that it had been determined that the tort was joint and concurrent. This result would follow although the proof showed that the tort was that of the servant alone, for the verdict upon that declaration would be conclusive and this evidence could not be enquired into in a subsequent action by master against the servant for re-imbursement.

It is not contended that an action could not be brought against both master and servant for a tort committed by the servant within the scope of his agency. We think that such an action could be brought, and that in the event of recovery and payment of judgment by master the latter could maintain his action for re-imbursement against the defaulting servant. But in such case the liability of the master springs from the operation of the law of *respondeat superior;* unless he participates in the wrong there can be no *joint* liability.

Where, however, the master and servant are sued upon an allegation of joint negligence, recovery should not be allowed except upon proof of such joint negligence. Otherwise the master could not enforce his right of re-imbursement.

Gableman vs. R. Co; 82 Fed. 790.
Doremus vs. Root, 54 L. R. A. 649.
Campbell vs. Portland Co; 6 Am. R. 503.
Pearsons vs. Winchell, 52 Am. D. 745.
Warax vs. R. Co; 72 Fed. 637.

Pomeroy Rem; sec. 308.
Landers vs. Felton, 73 Fed. 311.
Buswell Pers. Inj. 31.
Gas Co. vs. City, 9 Rich. (S. C.) 342.
Bolan vs. Williamson, 1 Brev. 181.

But, it may be insisted, as the verdict in this case is only against the Railway Company, how is it prejudiced? The answer is this: It is impossible to say upon what the verdict of the jury was rendered. Logically it can be supported only upon the ground that the Company was negligent in the matter of the defective coupler. But it is possible that the jury took the same view of the law which the Supreme Court of South Carolina has announced, that the verdict may have been based upon the negligence of the servants although their verdict would point otherwise. The Court says: "The master is responsible for the torts of his servants committed by them during the administration of the duties of their offices respectively. *That the servants are not held responsible personally is because such torts were committed in the master's service. "One may be taken and the others left."* (Transcript F. 125)

III.

A master is not liable in punitive damages for the wilful tort of one of his servants. To hold otherwise would deprive the master of his property without due process of law contrary to the 14th amendment Constitution of the United States.

It is interesting to note the course of the decisions in this State, (South Carolina) upon the subject.

In Parker vs. Gordon, Dudley 270, it is held that the master is not liable at all, not even in compensatory damages, for the wilful tort of the servant.

In McClenahan vs. Brock, 5 Rich. 27, it is held that the master is not liable for the wilful act of his servant.

In Brown vs. Griffin, 13 Rich. 37, it is suggested, though not decided, that the master may be held liable for the wilful tort of the servant.

In Redding vs. R. Co., 3 S. C., 1, it is held that the master is responsible in damages for the *wilful* act of his servant if done within the scope of his employment, though it is

strongly intimated, if not decided, that the master would not be responsible for the *malicious* act of the servant. Nothing is said about the master's liability in punitive damages.

In Palmer vs. R. Co., 3 S. C., 580, the point was first decided, if the statement of the Chief Justice, Willard, be correct. "The question, whether a corporation is liable to respond in exemplary damages for the misconduct of an agent, has not been settled in this State."

In this case the doctrine of the master's liability in exemplary damages was sustained upon the expressly stated "limited basis" of the relation of the passenger to the common carrier. The learned Justice cites nine cases in his opinion. Of these only two directly sustain his ruling. The case of R. Co. vs. Quigly, 21 How., 202, cited in the Palmer case proceeded upon the doctrine of express authority. The Board of Directors authorized the publication.

In Hall vs. R. Co., 28 S. C., 261, the question was not raised, the Court saying: "The Circuit Judge laid down the rule as to exemplary damages in terms to which no exception has been taken, and therefore for the purposes of this case at least, it must be regarded as the correct rule."

In Avinger vs. R. Co., 29 S. C., 265, exemplary damages were allowed against a corporation, but that was a suit to recover damages for a wilful failure and refusal to carry goods. It was the direct act of of the corporation, and the question of responsibility for the acts of the servant was not involved.

In Quinn vs. R. Co., 29 S. C., 381, the question was decided squarely against our contention, upon the authority of the Palmer and Hall cases, and Sutherland on Damages. The case of State vs. Morris &c. R. Co., 23 N. J., 369, cited in the opinion does not sustain the conclusion arrived at by the Court, for the reason that it only declares the undisputed principle that the master is liable in compensatory damages, not in exemplary damages, for the wilful act of the servant.

In Rucker vs. Smoke, 37 S. C., 377, the point is again decided against our contention, but upon authorities which are scant support for the proposition. For instance: Reynolds vs. Witte, 13 S. C., 18, was a suit to hold the principal responsible for the fraud of his agent. The agent had hypothecated securities fraudulently, and the defendant, his

principal, was held responsible for the agent's fraud, not in exemplary damages but in compensatory damages. The quotation from 1 Am. & Eng. Enc. L., 410, states no more than the undisputed rule that the master is liable for the negligence or fraud of the servant, in compensatory damages. The South Carolina cases cited, fall very far short of sustaining the proposition. Reading, Palmer, Hall, Avinger and Quinn have already been referred to. Epstain vs. Brown, was a direct action against the actual tort feasor. Parkerson vs. Wightman was a suit for compensatory damages against a landlord for an unlawful distress by his bailiff. It was held, "A principal is liable for the conduct of his agent, when he acts improperly and unlawfully but within the scope of his agency." As to this proposition there cannot be a question. In the opinion by Judge Richardson we find the following :

"It is conceded that the principal is not bound for the wilful trespass of his agent. . . . So that, according to my understanding of the law of principal and agent, the case presents a striking illustration of the liability of a principal for the conduct of his agent, when he acts improperly and unlawfully, but within the scope of his agency. If Dennis (the bailiff) had committed a wilful outrage or trespass, Wightman (the landlord) could not have been made liable." Citing the case, Oneal vs. Reigne, Miss. Dec. 1827, 2 Rice Digest 93. In that case it is held that the Master is not responsible for the wilful act of the servant. The separate opinion of Judge Withers, in the Parkerson case, concurred in by Judge O'Neall, contains a dissent upon another branch of the case, but as to the other point it is said : "The general rule is the intelligible and safe one, that wherever an agent, particularly a special and limited agent, does a wilful act that is unlawful, though he may not connect it with the current events of his agency, or cause it to spring from them, the master or principal shall not be presumed to have authorized it or to be responsible for it ; a *fortiori* shall he not be where the act is forbidden both by himself and the plain duty of the statute law."

The next case upon the subject is Cobb vs. R. Co., 39 S. C., 194, where the doctrine of the master's liability in

damages (not expressly stated *exemplary*) for the wilful act of the servant is announced without discussion.

At last comes the case of Skipper vs. Mfg. Co., 58 S. C., 143, which announces the doctrine that the master is responsible in exemplary damages for the wilful act of the servant, upon the authority of the cases of Rucker vs. Smoke, and Cobb vs. Ry.

In none of the cases decided in this State was the constitutionality of making one person suffer for the act of another raised. We propose to discuss the question from that standpoint.

The question of the liability of the master in punitive damages for the wilful tort of the servant is learnedly discussed in the case of Lake Shore and Michigan Southern R. Co. vs. Prentice, 147 U. S. Supreme Court Reports, 101, and decided by unanimous Court in the negative. The plaintiff brought suit for damages for the malicious arrest and other indignities imposed upon him by the conductor of one of the defendant's passenger trains, upon which the plaintiff was a passenger.

The court denied the right to recover punitive damages for the wilful tort of the servant, unless the defendant authorized or ratified the act. They say: "Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offence. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent." The Court further says: "A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express order of the principal."

And again: "Though the principal is liable to make compensation for a libel published or a malicious prosecution instituted by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate.

In Detroit Daily Post Co. vs. McArthur, in Evinson vs. Cramer, and in Haines vs. Schultz, above cited, it was held that the publisher of a newspaper, when sued for a libel published therein by one of his reporters without his knowledge, was was liable for compensatory damages only, and not for punitive damages, unless he approved or ratified the publication; and in Haines vs. Schultz the Supreme Court of New Jersey said of punitive damages: 'The right to award them rests primarily upon the single ground—wrongful motive.' 'It is the the wrongful personal intention to injure that calls forth the penalty. To this wrongful intent, knowledge is an essential prerequisite.' 'Absence of all proof bearing on the essential question, to wit, the defendant's motive, cannot be permitted to take the place of evidence, without leading to a dangerous extension of the doctrine *respondeat superior*.'"

And again: "No doubt, a corporation, like a natural person, may be held in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent necessary to warrant the imposition of such damages, is brought home to the corporation."

And again: "The jury were thus told, in the plainest terms, that the corporation was responsible in punitive damages for wantoness and oppression, on the part of the conductor, although not actually participated in by the corporation. This ruling appears to us to be inconsistent with the principle above stated, unsupported by any decision of this court, and opposed to the preponderance of well considered precedents."

In Wordrobe v. California Stage Co., 68 American Decisions, 231, it is said: "In the *Amiable Nancy*, 3 Wheat 546, which was a case of a marine trespass brought against the owners of a privateer for an illegal seizure, Judge Story, in delivering the opinion of the court, holds the following language: 'Upon the facts disclosed in the evidence this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. Under such circumstances, the honor of the country and the duty of the court equally require that a just compensation should be made to the unoffending neutrals for all the injuries and losses actually sustained by them. And if this was a suit against the original wrongdoers, it might be

proper to go yet further, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless conduct. But it is to be considered that this is a suit against the owners of a privateer, upon whom the law has, for motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely be able to secure to themselves an adequate indemnity in cases of loss.' Other authorities might be cited to the same point, but the rule is so well founded in principle and justice that we deem it unnecessary."

In Hagan v. Providence and Worcester R. R. Co., (R. I.) 62 American Decisions 376, it is said: "In cases where punitive or exemplary damages have been assessed, it has been done upon evidence of such wilfulness, recklessness, or wickedness on the part of the party at fault as amounted to criminality, which for the good of society and warning to the individual ought to be punished. If in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment and teach the lesson of caution to prevent a repetition of criminality; yet we do not see how such damages can be allowed, where the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him *particeps criminis* of his agent's act. No man should be punished for that of which he is not guilty."

In Pittsburgh &c. R. Co. v. Russ, 57 Federal Reporter, 822, it is said: "In the case of Railroad Co. v. Prentice, 147 U. S. 101, 13 Supt. Ct. Rep. 261, decided since the trial of this case, it was held that a railroad corporation is not liable to exemplary or punitive damages on account of illegal, wanton and oppressive acts of its conductors or other subordinate agents. The decision rests upon the principle, applicable alike to corporations and individuals, 'that no man should be punished for that of which he is not guilty;' and, consequently, that it is enough that the principal is responsible for the actual consequences of wanton or malicious conduct of an agent within the line of his employment, and not

beyond that, unless he has been in some way particeps criminis."

In Forham vs. Consolidated Traction Company, (N. J.) 6 Amer. Neg. Reports 601, it is said: "A principal, whether an individual or a corporation, cannot be charged with punitive damages for the illegal, wanton or oppressive conduct of a servant, unless the principal participated in the wrongful act of the servant, either expressly or impliedly, by his conduct authorizing or approving it either before or after it was committed. Punitive damages are in the nature of a penalty, especially designed as a punishment for the wanton conduct or malicious motives of a tort feasor, and can be lawfully imposed only when the reprehensible act is brought home to the defendant."

In Bank vs. Pacific &c. Co., 103 Federal Reporter, 841, it is said: "Exemplary or punitive damages are always penal in theory and are only imposed for the sake of punishment, or by way of example, in addition to compensatory damages, where the defendant has acted with malice or guilty intention. While the employee of the defendant in the present case is shown to have acted with intent to defraud in sending the forged telegram, he is personally punishable for that crime, and there the punishment must cease, as the defendant neither authorized nor ratified the employee's act and cannot be held liable in exemplary damages, upon the principle that no person should be punished for that of which he is not guilty. This question is thoroughly discussed in the case of Railway Co. vs. Prentice, 147 U. S. 107, 13 Sup. Ct. 261, 37 L. Ed. 97, and the rule there announced has been unvaringly followed in the consideration of similar cases. Railway Co. vs. Russ, 6 C. C. A. 597, 57 Fed. 822; McGhee vs. McCarley, 33 C. C. A. 629, 91 Fed. 462."

In Garrick vs. Railroad Co., 53 S. C., 448, the question was whether exemplary damages were recoverable under Lord Campell's Act. Discussing the two kinds of damages, the Court says: "Compensatory damages and exemplary or punitive damages are of an entirely different nature and rest upon wholly different principles. The former is intended to provide a recompense for injuries sustained, while the

latter is *intended only as a punishment to the wrongdoer*, and to furnish an example to him and other wrongdoers of the danger attending the wrongdoing. . . . The Legislature having said that its object was compensation, the courts have no authority to say that its object was punishment also."

Although the corporate principal might be held liable in compensatory damages for the act of the agent, "still it does not follow that they are to be visited with damages by way of punishment, without proof that they directed the act to be done, or subsequently confirmed it. Such damages," the court observes, "are given by way of punishing the malice or oppression, and are graduated by the intent of the party committing the wrong. But in an action against a principal for the act of an agent, how can the question of their assessment be properly submitted to the jury, when there is no evidence connecting the principal with such intent on the part of the agent? Clearly it cannot," is the conclusion. Milwaukee, etc., R. Co. v. Finney, 10 Wis. 388.

As shown by these authorities, the highest in this State and the highest in the United States, the object of punitive damages is *punishment*, as the term implies. It is in no sense *compensation*, as distinctly described in the Garrick case.

In former times, and now, in some of the States, the entire doctrine of punitive damages has been repudiated. Nowhere are the objections to it more forcibly put than in the case of Spokane &c. Co. v. Hoefer, (Wash.) 11 L. R. A., 691. The opinion is worthy of careful study. The objections are, (1) The rule of reasonable doubt in criminal cases gives way to that of preponderance of evidence. (2) The defendant may be compelled to testify against himself. (3.) He is deprived of the right to face his witnesses, as testimony may be taken by commission. (4) The measure of compensatory damages is unstinted; actual loss, physical pain, mental anguish, indignity, humiliation, disfiguration, loss of reputation, loss of honor, impairment of credit, every actual loss "and some which frequently border on the imaginary." It is unreasonable that plaintiff should, after this unstinted measure, be allowed additional compensation. (5) The danger

of allowing this power of punishment, which is confided to the Judge, to the unguided judgment of the jury. (6) The difficulty of its proper application.

This is referred to, not for the purpose of disturbing the rule which has been firmly established, of allowing punitive damages in a proper case, but for the purpose of impressing upon the Court the danger of extending the doctrine beyond its legitimate scope.

Being intended as a punishment, it would seem that the person to be punished should be the one guilty of the wrongful motive. By a legal fiction the act of the agent is made the act of the principal, and by a similar course of reasoning a motive, which the principal did not in fact entertain, is imputed to him for punishment.

The principal no less than any other good citizen disapproves the malicious act of his agent. He, as much as any other good citizen, is interested in the punishment of the guilty party, and yet he who disapproves of the act, who wishes to see it punished, is made to present himself as a vicarious sacrifice to atone for something he has not done, while the guilty party escapes. It is not right, it is not just. It seems incredible that the law should carry the legal fiction of the identity of the master and servant to such an extent; and we submit that it cannot do so. It is punishing one man for what another has done and is taking his property without due process of law.

"An act of the Legislature which arbitrarily made one person liable for the debts or responsible for the acts of another would deprive him of due process of law."

Camp v. Rogers, 44 Conn. 291.

In *In Re Ah Lee* 5 Fed. 899, the Court, per Deady, J., said that the 14th Amendment of the Federal Constitution, providing that no State shall deprive any person of life, liberty or property without due process of law, "forbids a State to act towards individuals in disregard of what are generally deemed fundamental principles. So far then it is a bulwark against local tyranny and oppression."

Judge Cooley says that the following statement by Justice Johnson, in Bank v. Okely, 4 Wheat. 235, "embodies more

tersely and accurately the correct view of principle"; "They were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice;" and adds his own definition of due process of law: "Due process of law in each particular case means such an execution of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

"In many cases the courts, in the exercise of their ordinary jurisdiction, cause the property vested in one person to be transferred to another, either through the exercise of a statutory power, or by the direct force of their judgments or decrees, or by means of compulsory conveyances. If in these cases the courts have jurisdiction, they proceed in accordance with the law of the land; *and the right of one man is devested by way of enforcing a higher and better right in another.*"

Cooley Const. Lim. 439.

Is it possible to say that a man who by the policy of the law is answerable in compensatory damages to another, who has suffered by the wilful tort of a servant, shall respond in punitive damages also? Can it be said that he is thus divested of his property by way of enforcing a higher and better right in the person damaged? The person damaged has his action for compensatory damages against the master, and this is farther than the courts of this State went at one time; (in Damner v. R. Co., 4 Rich. 335, it is held that the defendant would not be liable for the wilful act of the engineer in running over the cattle;) he has his action for compensatory and for punitive damages against the servant; the criminal Courts are open to him for a prosecution for malicious trespass; it is inconceivable that he should have a "higher and better right" to take the master's property as a punishment for an offense which he did not commit, for a motive which he did not entertain but condemned and forbade.

"The right to private property is a sacred right. . . . But as it is a right which rests upon equities, it has its reason-

able limits and restrictions; it must have some regard to the general welfare and public policy."

Cooley Const. Lim. 438.

Does it conduce to the general welfare to punish a man for an act which he did not commit? It has been supposed that the object of punishment is to prevent the repetition of the offence by the offender and to deter others. Does the punishment of the master tend to prevent the repetition on his part of an offense which he did not commit? Does the punishment of the master tend to prevent other persons from allowing their servants to commit wilful torts, when every energy of organized capital in industrial occupations is directed to prevent acts of negligence even, much more acts of wilful wrong?

To further the ends of justice, to foster the general welfare, to enforce the dictates of public policy, punish the offending servant; teach him not to repeat the offense; deter other servants by the force of example from similar acts.

But, it may be suggested, the punishment of the master will make him more careful in the selection of his servants. The recovery of compensatory damages will fully accomplish this purpose, and, besides, if the master has shown a reckless disregard of his duty in the selection of competent servants the law of punitive damages will reach him. Few men are totally depraved and malicious. Few homicides are committed as the result of such total depravity. They occur often upon the spur of the moment, totally unsuspected by the perpetrator. So with such acts upon the part of a servant. The greatest care on the master's part cannot foresee and guard against them.

It is claimed however that this does not raise a Federal question. We submit that it does. The Supreme Court of the United States has decided in the Prentice case that the object of punitive damages is to punish the offenders, and that a master cannot be punished for an act and motive which he did not commit or entertain. It is the punishment of one man for what another does.

IV.

The Supreme Court of South Carolina erred in its construction

and application of the act of Congress relating to automatic couplers.

(1.) The car upon which the defective coupler was, is shown by the testimony to have been a car upon the side track; it is not shown to have been used to move interstate commerce; the Act was therefore inapplicable.

By the plain terms of the Act it applies only to cars "used in moving inter-state commerce."

Johnson vs. R. Co., 117 Fed. 462, sustains this obvious statement and holds:

"Vacant cars in yards on side tracks, in repair shops, or in trains which are not loaded with or in use to move articles of interstate commerce, do not fall within the terms or meaning of the Act of March 2, 1893." It was accordingly held that a dining car which was standing empty on a side track, at an intermediate station, where it had been left by a train engaged in interstate commerce until it should be taken by another train engaged in the same traffic, going in the opposite direction, and which was intended for use in interstate commerce, and which was drawn by a freight engine from the side track, to the turn-table and placed again on the side track, was not used in moving interstate commerce while it was on the side track and while being turned. The Act was therefore held inapplicable to such a case.

The exception raising this question (f. 297) is accompanied with the statement that the point was not raised before the Circuit Judge. That is true, but the matter was not up until the Judge charged the jury and it was impossible then to raise it. It certainly was not conceded anywhere in the case that the Act was applicable to any part of the case.

(2.) The Act applies only when the Railway Company fails to use cars equipped with automatic couplers. It does not apply when the Company has equipped its cars with such couplers, one of which is temporarily out of repair.

The charge of the Judge was as follows: "If you believe that said cars were not equipped with couplers coupling automatically by impact, so as to obviate the necessity of plaintiff going between them to effect the coupling, such failure to provide such automatic couplers was negligence, &c."

This law was inapplicable to the case, as it appeared beyond dispute, in the complaint and in the evidence that the car in

question was equipped with automatic couplers, which, when in order, permitted a coupling automatically by impact. It appeared in like manner that there was a certain pin out of the coupler which allowed the coupling pin to be drawn entirely out of the draw-head; and to this extent the coupler was defective. As a matter of fact the car, owing to this defect, was not equipped with a coupler which would work automatically; but plainly, the Act of Congress should not apply to a temporary defect, one which could be remedied in two minutes according to the plaintiff's own statement. The error of the Circuit Judge, we submit, was in practically holding that a coupler which in a normal condition complied with the Act of Congress, would not do so if temporarily out of repair. The jury naturally concluded that if there was a broken part in the coupler which prevented, for the time being, an automatic coupling, it was not such a coupling as the law required. The point of abrasion, the hurting point, in the charge, was this; if the Company had not complied with the Act of Congress the failure to do so was negligence per se; if it had complied with the Act and the appliance was temporarily out of repair, the Company's negligence in such event became a question of fact for the jury, they passing upon the question whether the Company had exercised ordinary care in keeping it in repair. How the little pin got out of the coupling pin no one knows; the car was on a side track near the Factory store, in a factory village, where hundreds of people congregate, and the trouble may have been caused by some meddler. Upon the question of ordinary care the jury was not allowed to pass. They were told if it was in a condition which would not admit of automatic coupling, the Company was guilty of negligence, under the Act of Congress.

A conclusive reason, it seems to us, why the Circuit Judge was wrong in his construction, is this: the Act provides a penalty of $100 for a violation of the requirement. It would hardly be contended that a temporary defect in an automatic coupler would subject the Company to this penalty; and yet, if the charge be correct, it would.

(3) In charging that the failure to provide automatic coupler was negligence which continued up to the very moment of the collision, the Circuit Judge eliminated the question of the

plaintiff's duty under Rule 12 to examine the coupler and report the defect immediately.

Rule 12 is set out at folio 230. By it the plaintiff was required to inspect the coupler and not to work with it, if found defective, but to report the defect immediately to his superior officer. This he admits he did not do. The charge eliminates the defence of contributory negligence based upon an infraction of this rule.

"If the defendant in error had access to the rules of the railway company, and was charged with notice of their requirements, and such rules were reasonable, and required the defendant in error, as a brakeman on the train, to inspect the links and drawheads, and the defendant in error neglected to make such inspection, which inspection would have shown the defective character of the link which caused the accident, resulting in the injuries complained of, it is clear that the defendant in error by his own negligence, contributed to his own injury."

Alabama G. S. R. Co. vs. Carrol, 84 Fed. Rep. 785.

"A brakeman was killed by the breaking of a brake which he was attempting to set. Four of the spokes of the brake wheel broke where they joined the rim, and the ends were rusty. The company put in evidence an agreement signed by the brakeman, providing that before working with any cars, engines, machinery, or tools he should examine their condition, and that he should take sufficient time to make the examination, and refuse to obey any order which would expose him to danger. It was held that such agreement only required the brakeman to be attentive and vigilant to discover defects in the machinery, and to refrain from using machinery if he learned it was defective; but it was no defence where it appeared that the defect could only be discovered by an expert. Pratt vs. Lake Shore & M. S. R. Co., 45 N.Y. S. R. 715, 63 Hun. 616, 18 N. Y. Supp. 682, affirmed in 136 N. Y. 654, mem., 32 N. E. 1016, 49 N. Y. S. R. 915."

(4) The act requires that the cars be equipped with couplers, coupling automatically, and which can be uncoupled without the necessity of men going between the ends of the cars. It does not require that they be so arranged as to obviate the

necessity of going between them for the purpose of adjusting knuckles for a coupling. The charge so construes the act.

The Circuit Judge charged the jury that the coupler must be automatic, and so arranged that the coupling may be made by impact, obviating the necessity of going between the cars for any purose to effect the coupling. The Act does not so read. It does provide that so far as uncoupling is concerned it must be so arranged, but the necessity of going between the cars to prepare the knuckles for the impact is made perfectly clear by the testimony on both sides. The Johnson case from 117 Federal Reporter (supra) construing the Act, decides that it is penal in its character and must be strictly construed.

Respectfully submitted,

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Greenville, S. C., April 4, 1904.